No. 83-1162

In the Supreme Court of the United States

OCTOBER TERM, 1983

ANTHONY PICCOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the conspiracy count of the indictment was impermissibly vague.

2. Whether the jury instruction on the conspiracy count constituted plain error.

3. Whether the trial court's admission of statements by co-conspirators constituted an abuse of discretion.

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OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. 16a-33a) is reported at 696 F.2d 1162. The opinion of the en banc court of appeals (Pet. App. 1a-15a) is reported at 723 F.2d 1234.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 16, 1983, and the petition for a writ of certiorari was filed on January 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 1); possession of cocaine with intent to distribute it,

in violation of 21 U.S.C. 841(a)(1) (Count 2); and distribution of 108 grams of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 3). Petitioner was sentenced to a term of five years' imprisonment on the conspiracy count and to a "general" five-year term of imprisonment on Counts 2 and 3, to be followed by a special parole term of three years.[1]

2. The evidence adduced at trial is summarized in the opinion of the en banc court of appeals (Pet. App. 2a-3a). It showed that from early 1977 through June 1979, petitioner, together with Ernest Marcangello, Jerome Allen, Michael Parese and Keith Smith, was involved in a cocaine distribution network in the Detroit area. Petitioner distributed cocaine to Marcangello and Parese and had drug-related contacts with their associates, Allen and Smith.[2] Two federal undercover agents, together with an informant (John Blue), met in early 1979 with Allen, a Detroit attorney involved in the narcotics trade, to purchase cocaine from him. On February 1, 1979, Allen and Marcangello delivered a sample of cocaine to the agents through Blue. At a subsequent meeting between the FBI agent and Allen, plans were made for a future drug transaction (Pet. App. 2a).

On February 15, 1979, arrangements were made for a sale later that day at the Hyatt Regency Hotel. Allen travelled to Marcangello's home, but Marcangello stated he didn't have the cocaine but would have "to get it from 'Pic.' " Marcangello telephoned petitioner, and then, while under the surveillance of federal agents, he and Allen went to petitioner's residence. Allen testified that petitioner and Marcangello

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[1]Both the panel and the en banc court held that although petitioner properly could be convicted on the two substantive counts, he could not be sentenced on both counts because "the only possession [occurred] immediately prior to distribution" (Pet. App. 12a n.2).

[2]Allen and Smith testified for the government at trial (Pet. App. 2a-10a).

went into the kitchen and that Allen and Marcangello then departed. En route to the Hyatt Regency, Marcangello told Allen that he "had it." They then met the undercover agents in the hotel room. In a conversation that was recorded and introduced into evidence, one of the agents questioned the quality of the cocaine. Allen and Marcangello responded that they had brought the cocaine straight from the "source" (*i.e.*, petitioner) and that it had not been diluted. The agents paid $8,000 for approximately four ounces of cocaine and inquired about making larger purchases of cocaine on a regular basis. Marcangello said that such a relationship could be arranged, adding that his source was Italian and about 20 years older then he (Pet. App. 2a-3a). Subsequently, the agents discussed other cocaine sales with Allen and Marcangello, who, in turn, met with petitioner to confer regarding those drug deals. Petitioner also had a telephone conversation with Allen regarding the trustworthiness of the undercover purchasers (*ibid.*).

Prior to trial, petitioner moved to dismiss the conspiracy count on the ground that it failed to identify the co-conspirators or to specify other details of the conspiracy charge. He also moved for a bill of particulars. The trial court denied petitioner's motions, noting that the conspiracy count was sufficiently specific and that a bill of particulars was not necessary because most of the government's evidence already had been disclosed to the defense in the course of discovery (Pet. App. 21a).

3. A divided panel of the court of appeals reversed petitioner's conviction on the conspiracy count (Pet. App. 16a-38a). It held that the conspiracy count of the indictment was "not specific enough to cabin the prosecutor and prevent him or her from 'roaming' at large" (*id.* at 23a) and that the trial court failed "to adequately instruct the jury by tying the abstract legal instructions to the specific facts of the case" (*id.* at 33a).

However, the court of appeals thereafter granted rehearing en banc and affirmed petitioner's convictions by a vote of nine to two (Pet. App. 1a-12a). The en banc court rejected the contention that the conspiracy count had given the prosecutor a " 'blank check' to be completed at trial." The court concluded (*id.* at 7a) that the government's "theory of criminality was fully set forth in the indictment," was "unalterably clear," and was "unvarying throughout the trial." The court also concluded that the jury instructions on the conspiracy charge were proper and, at all events, did not amount to plain error that would require reversal despite petitioner's failure to object to them at trial (*id.* at 10a-12a). Judges Jones and Keith, who had comprised the majority of the panel that originally reversed petitioner's conspiracy conviction, dissented from the en banc court's disposition of the case (*id.* at 13a-15a).

ARGUMENT

1. Petitioner principally contends (Pet. 5-8) that the conspiracy count[3] of the indictment was impermissibly vague because it assertedly failed to identify the alleged co-conspirators or to identify the scope of the conspiracy and thus allowed him to be convicted on the basis of any conspiracy the government happened to prove at trial. This fact-bound contention was properly rejected by the en banc court of appeals.

"[An] indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). Petitioner does not contend that the indictment was inadequate to protect his

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[3]The indictment is set out in full at Pet. App. 3a-4a.

rights under the Double Jeopardy Clause. As the court of appeals explained, such a contention would be without merit in any event, because "the indictment clearly specifies the amount and type of narcotics involved, the precise date of sale, and the location of the sale" (Pet. App. 6a).

Petitioner's contention therefore must be that the indictment failed to fulfill the first purpose of an indictment —*i.e.*, that it failed to apprise him sufficiently of what he must be prepared to meet. The flaw in this contention, however, is that the specificity the court of appeals identified in stressing that the indictment was "fully adequate" to create a bar for double jeopardy purposes also afforded him ample notice of what he must be prepared to meet. The indictment described the period of the conspiracy and its object to possess and distribute cocaine (Pet. App. 3a-4a). Moreover, in reciting overt acts in furtherance of the conspiracy, the indictment focused in particular on the transaction of February 15, 1979; it identified Allen and Marcangello by name and stated that petitioner met with them at his residence, that they then travelled to the Hyatt Regency, and that Marcangello there distributed 108 grams of cocaine. The conspiracy count of the indictment in this case therefore did not constitute an invitation to the prosecutor to "roam at large — to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial" (*Russell* v. *United States*, 369 U.S. 749, 768 (1962)).[4] To

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[4]This case is quite different from *Russell*, upon which petitioner principally relies (Pet. 6-7). In *Russell*, the Court held that the indictment under 2 U.S.C. 192 for refusing to answer a question pertinent to a congressional inquiry was faulty because it failed to identify the topic that was under inquiry by the committee and therefore left the defendant unable to defend on the issue of pertinence. The Court observed that identification of the subject under legislative inquiry "is central to every prosecution under the statute" and that "[w]here guilt depends so crucially upon such a specific identification of fact," the indictment

the contrary, as the en banc court of appeals observed, the government's "theory of criminality was fully set forth in the indictment and was unvarying throughout the trial" (Pet. App. 7a). The theory of criminality formulated in the indictment "plainly stated" that petitioner was a member of a cocaine distribution conspiracy that occurred between specified dates and involved "a definite series of overt acts on February 15, 1979 through two named individuals [Allen and Marcangello]," and the government did not abandon or ignore that theory at trial (*id.* at 7a-8a).

The court also properly rejected petitioner's argument that the mere fact that the indictment included, as such indictments commonly do, references to unnamed co-conspirators permitted the government "to construct fanciful or alternate conspiracies at trial, wholly unknown to the grand jury" (Pet. App. 8a). As the court aptly noted, "[b]ecause the grand jury particularly described the unlawful agreement which formed the [government's] theory of criminality," the indictment adequately apprised petitioner of the charge he had to meet and confined the prosecution to that charge during the trial (*ibid.*). See *United States* v. *Davis*, 679 F.2d 845, 851 (11th Cir. 1982) (it is the grand jury's statement of the "existence of the conspiracy agreement rather than the identity of those who agree" that places the defendant on notice of the charge he must be prepared to meet).

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must do more than simply track the statutory language. 369 U.S. at 764. In this case there was no comparable need for factual allegations to give content to a statutory term. Petitioner was apprised of the duration and object of the conspiracy and the drug involved; several other participants were identified; and a principal transaction was described in some detail.

2. Likewise baseless is petitioner's related claim that the jury instructions on conspiracy, to which he did not object,[5] constituted plain error requiring reversal of his conviction. Petitioner expressly concedes that the jury's instructions "reflected correct legal principles" (Pet. 9-10). But he nevertheless argues that the instructions were improper because they assertedly failed to instruct the jury "on the government's theory of the case" or "as to precisely what conspiracy was charged in the indictment." But as we have explained above, the conspiracy charged in the indictment in this case had a simple factual basis, and the government's theory and proof at trial did not deviate from it. Furthermore, the trial court specifically instructed the jury that the government was required to prove "the conspiracy alleged in the indictment" (Pet. App. 10a-11a).[6] Especially in these circumstances, there is no reason to believe that the jury was unable to apply the instructions to the facts of the case. Far less did any omissions from these concededly correct instructions constitute error so plain that petitioner's conviction should be set aside despite his failure to object.

3. Finally, petitioner contends (Pet. 8-9) that the trial court erred in admitting certain hearsay statements of coconspirators, contending that his connection with the conspiracy had not been established by a preponderance of the other evidence. In particular, he asserts that the Court should resolve a conflict among the courts of appeals regarding whether the hearsay statements themselves may be considered in determining whether the defendant's

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[5]As the en banc court stated, "[i]n the instant case there were two complete hearings on the proposed jury instructions during which both parties requested modifications, ten sections of the charge were modified at [petitioner's] request, and defense counsel pronounced himself satisfied with the final instructions" (Pet. App. 11a-12a).

[6]Relevant portions of the jury instructions on conspiracy are set out in the en banc opinion at Pet. App. 10a-11a.

connection with the conspiracy has been established by a preponderance of the evidence, as the Sixth Circuit has held (see *United States* v. *Vinson*, 606 F.2d 149, 153 (1979), cert. denied, 444 U.S. 1074 (1980)), or whether that connection must be established by evidence independent of the statements.[7]

This Court recently declined to review a similar claim (*Arnott* v. *United States*, cert. denied, No. 82-2028 (Oct. 31, 1983)), and there is no reason for a different result here. In *Arnott*, we argued (Br. in Opp. 10) that there was in any event adequate independent evidence to support the admission of the statements, even though the court of appeals had not expressly so found. See *Arnott* v. *United States*, slip op. 1-3 (White, J., dissenting from denial of certiorari). Here, by contrast, the panel of the court of appeals *did* expressly find that "there is independent evidence that tends to meet the preponderance requirement for the finding that [petitioner] was a member of the conspiracy" (Pet. App. 28a

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[7]Most of the courts of appeals that have addressed the issue do not provide for admission of co-conspirator statements into evidence without a showing by a preponderance of the evidence independent of such statements (1) that a conspiracy existed; (2) that the declarant and the defendant against whom the statement is admitted were both members of the conspiracy; and (3) that the statement was made in furtherance of the conspiracy. See *United States* v. *Nardi*, 633 F.2d 972, 974 (1st Cir. 1980); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970); *Government of Virgin Islands* v. *Dowling*, 633 F.2d 660, 665 (3d Cir.), cert. denied, 449 U.S. 960 (1980); *United States* v. *Gresko*, 632 F.2d 1128, 1131 (4th Cir. 1980); *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); *United States* v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States* v. *Petersen*, 611 F.2d 1313, 1327 (10th Cir. 1979), cert. denied, 447 U.S. 905 (1980); *United States* v. *Jackson*, 627 F.2d 1198, 1213-1220 (D.C. Cir. 1980). The Ninth Circuit requires evidence sufficient to establish a prima facie case. *United States* v. *Miranda-Uriarte*, 649 F.2d 1345, 1349 (1981).

n.7). The court relied upon "[t]he amount of the narcotics, the trip to his home, the previous dealings with Allen and statements made to him by [petitioner]" (*ibid.*). The en banc court of appeals did not disturb this conclusion (see Pet. App. 9a n.1). This therefore would not be an appropriate vehicle for consideration of petitioner's contention even if the Court were otherwise disposed to grant review in such a case.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]The panel also observed that there is "good sense" to the suggestion that the hearsay statement "ought to be given little weight by the court in determining whether a proper foundation for admission has been established" (Pet. App. 28a n.7), thereby indicating that the differing approaches of the Sixth Circuit and other courts might not actually affect the outcome in a significant number of cases.